(33) A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

(Division Bench)

CORAM : Hon'ble Shri Lal Chand Bhadoo, J. and
Hon'ble Shri Vijay Kumar Shrivastava, J.

Criminal Appeal No.345 of 2003

Khorbahra Verma and others

Versus

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
V.K.Shrivastava
Judge

HON'BLE SHRI JUSTICE LAL CHAND BHADOO

Sd/-
L.C.BHADOO
Judge

Keep Free/ Counsel for the appellants 08-02-06

POST FOR 07/02/2006

Sd/-

JUDGE
07/02/2006

(34)

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(Division Bench)

CORAM : Hon'ble Shri Lal Chand Bhadoo, J. and Hon'ble Shri Vijay Kumar Shrivastava, J.

Criminal Appeal No.345 of 2003

Appellants (In Jail) :

1. **Khorbahra Verma,** S/o Babulal, aged 50 years,
2. **Taneshwar Verma,** S/o Khorbahra, aged 26 years
3. **Daleshwar Verma,** S/o Khorbahra, aged 20 years

All the above appellants are R/o Village Jhabdi, Police Station Kasdol, District Raipur (C.G.)

Versus

Respondent : **State of Chhattisgarh,** through Station House Officer, Police Station, Kasdol, District Raipur (C.G.)

Mr. Rajeev Shrivastava with Mr. Shiv Kumar Guha, counsel for the appellants.
Mr. Ashish Shukla, Additional Public Prosecutor with Mr. Akhil Mishra, Panel Lawyer for the respondent/State.

J U D G M E N T

(Delivered on 07/02/-2006)

Per Vijay Kumar Shrivastava, J.

This appeal has been directed against the judgment of conviction and order of sentence dated 19-2-2003 passed by IInd

Additional Sessions Judge, Baloda Bazar, District Raipur in Sessions Trial No.319/02, whereby learned Additional Sessions Judge held the appellants guilty for committing the offence of murder in furtherance of common intention punishable under Section 302 read with Section 34 of the Indian Penal Code and sentencing each of them to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in default of payment of fine, to undergo additional rigorous imprisonment for 6 months.

2. Facts essential for disposal of this appeal in brief compass are that, Lalji and others filed a civil suit for declaration of title and permanent injunction over disputed land bearing Khasra No.777 area 0.316 hectare against appellants Tileshwar, Daleshwar and others in the Court of IInd Additional District Judge, Baloda Bazar. The civil suit was registered as Civil Suit No.1A/2000 and was decided on 10-12-2001. The Court dismissed the suit holding appellants Tileshwar and Daleshwar owners, who are in possession of the suit land. On 25-8-2002, Deceased Ramkirtan had gone to the spot that is known as Granary (Byara) to keep the Thorns cut by appellants and his companion in the Byara. Golu and his grand mother were also there to help Ramkirtan in his work. Around 9.30 A.M., appellants accompanied with Mukteshwar and Tileshwar carrying Axe, Stick and Knife came there and with intent to kill Ramkirtan attacked him with the weapons carried by them. Ramkirtan received serious injuries and died on the spot. Surendra alias Golu saw the incident and rushed to his house to call his father. Ramkumar, having learnt about the incident, rushed up to the Granary, where he saw the dead body of his brother Ramkirtan having various injuries on his head and neck caused by Axe. The

dead body was lying in pool of blood. He went to Kotwar and apprised the incident to Bhuneshwar. Govind, Ramsharan, Bhuneshwar and others came and saw the dead body. They accompanied Ramkumar to Police Station Kasdol.

3. Ramkumar lodged F.I.R. and Merg Intimation. M.R.Sinha, Assistant Sub-Inspector of Police recorded Merg Intimation and F.I.R. M.R.Sinha, after recording F.I.R. and Merg Intimation, went to place of incident, where he found the dead body of Ramkirtan. After calling Panch witnesses, he prepared a Panchnama of dead body and sent the dead body for autopsy. He collected plain earth, blood stained earth, prepared spot map and recorded statement of some of the witnesses. Further investigation was taken up by Lambodar Patel, Sub-Inspector of Police, who recorded memorandum statements of Taneshwar, Daleshwar and Khorbahra and on their discovery statements recovered one Axe from accused Taneshwar, one Club from accused Daleshwar and one another Axe from accused Khorbahra and seized all these articles. Both the Axes were sent by him to Medical Officer for examination and opinion. He also recorded statements of some of the witnesses.

4. Dr. Y.K.Sharma conducted autopsy on the body of deceased Ramkirtan. He found various injuries on his body, described all those injuries in his report. In his opinion, the cause of death was cardio respiratory arrest due to spinal and vascular injury. The death was homicidal in nature. He also examined both the Axes and returned both these Axes under sealed condition along with his report. He also collected the blood stained Baniyan of

deceased and full pant from the dead body and sent these articles to Police Station, Kasdol. Both the Axes recovered and seized from appellants Khorbahra and Taneshwar. Controlled earth, blood stained earth and blood stained Baniyan of the deceased were sent to Forensic Science Laboratory, Raipur for examination. Assistant Chemical Examiner, after examining these articles reported that except controlled earth, all other articles were stained with blood. After completing the investigation, Station House Officer, Kasdol led charge-sheet against Khorbahra, Taneshwar, Tileshwar and Daleshwar in the Court of Judicial Magistrate First Class, Baloda Bazar and case against Mukteshwar was led before Juvenile Justice Board.

5. Both the cases were committed to the Court of Session for trial. As both the cases arose out of same incident, therefore, they have been tried jointly. Charges under Section 302 read with Section 34 of the Indian Penal Code were framed, read over and explained to appellants, who abjured the guilt and took the defence that due to land dispute, they have been falsely implicated in this case. Learned Additional Sessions Judge, after due appreciation of the evidence, held the charge against Tileshwar and Mukteshwar not proved beyond doubt, therefore, acquitted both these accused of the charge under Section 302 read with Section 34 of the Indian Penal Code but held appellants guilty for committing the murder of Ramkirtan in furtherance of their common intention punishable under Section 302 read with Section 34 of the Indian Penal Code and, therefore, sentenced them as afore mentioned.

6. Dr. Y.K.Sharma has conducted post mortem on the body of deceased Ramkirtan and has proved his report Ex.P-27. From his statement on oath before the Court and his report Ex.P-27, it is proved that, following ante mortem external injuries were found on the body of deceased Ramkirtan : -

External Ante Mortem Wounds :

1. "Soft tissue swelling, deformity in posterior lateral aspect of middle third of left forearm about 4" above elbow. Incised wound size 1"x ½"x½" in posterior lateral aspect of left forearm about 4" above elbow. Fracture of shaft humerus left clots present in muscles.

2. Incised wound 2"x ½"x1" present 2½" above sternal notch transversely present across midline, blood clots present in wound.

3. Incised wound 2"x½"x1" below right angle of mandible about 2" below right ear.

4. Incised wound size 3"x½"x½" transversely placed in plost triangle of neck on left side, about 3" below lobule of left ear. Underlying muscles are cut.

5. Lacerated wound size 1"x½"x1" about 1½" below lateral half of left eye vertically placed.

6. Incised wound 2"x1"x1½" vertically situated in neck in posterior aspect of neck about 3" posterior to left ear. At site of injury No.2 muscle, trachea, oesophagus are cut within the line. Collected blood present in trachea. At site of injury No.3 lanjue, carotid artery right is cut. Cervical vertebra is also cut."

7. From the oral evidence of Dr. Y.K.Sharma, P.W.-11 and his post mortem report, Ex.P-27, it is also proved that on internal examination, third cervical vertebra was found cut in the line of injury No.3, muscles of neck were cut in the line of wound of neck, central vertebra cut and fracture on shaft of humorous was present. The cause of death was cardio respiratory arrest due to spinal and vascular injury. The death was homicidal in nature.

8. Taking into consideration the injuries found on the body of deceased Ramkirtan, its gravity and the oral evidence of Dr. Y.K.Sharma which is found to be credible, it has been proved that the death of Ramkirtan was homicidal and as a result of injuries caused to him he succumbed to injuries.

9. To hold the appellants guilty for committing the murder of Ramkirtan in furtherance of common intention, learned trial Court has relied on the oral evidence of Surendra alias Golu, P.W.-10, Bhuvan, P.W.-5, Ramkumar, P.W.-1 and has also placed reliance on F.I.R., Ex.P-1, memorandum, Ex.P-4, P-6 and P-8 and recovery of Axe, small Axe containing blood stain over it.

10. Learned counsel for the appellants contended that F.I.R. has been lodged against appellant Khorbahra. Name of other appellants do not find place in the F.I.R. Due to animosity, rooted out of land dispute, whole family has been falsely implicated in this case. The evidence of Surendra alias Golu, P.W.-10 has been exaggerated from time to time. His Court statement is contradictory to his previous statement. Police recorded his statement several times. Ramkumar, P.W.-1 was not an eye-witness and Bhuvan,

P.W.-5 also did not witness the incident. Therefore, the oral evidence to support the prosecution story was not reliable and the blood stain found over both the Axes have no relevancy to support the prosecution case because in village such weapon are found in every house for their domestic work and without discovery of origin of blood, the presence of blood stains on these Axes does not create any evidence against the appellants. Per contra, learned counsel for the State submitted that although some discrepancy has been brought in the evidence of Surendra alias Golu, P.W.-10, a child witness, but that itself is not sufficient to discard his whole testimony when the same is duly corroborated by the evidence of Bhuvan, P.W.-5, Ramkumar, P.W.-1 and document, Ex.P-1. Memorandum and seizure of two Axes containing blood stains have been proved and as corroborative piece of evidence the seizure has corroborative value in this case. Learned counsel for the State supported the reasonings and finding of the trial Court.

11. Surendra alias Golu, P.W.-10 is an eye-witness. He has stated in his statement that Khorbahra and his four sons have killed Ramkirtan. In the morning around 8.30 A.M., he, his grand mother and uncle Ramkirtan were in Badi. Ramkirtan was fencing Badi and he and his grand mother were assisting him by bringing Thorn Bush near Ramkirtan. At that time, Khorbahra, along with all his sons, carrying Axe, Knife and Club came there and all the accused attacked over Ramkirtan. They assaulted and caused injuries on the neck, back and left hand of Ramkirtan. Blood started oozing out of the injuries. Both he and his grand mother raised an alarm and rushed towards his father to call him. His father was over the wall, who, after hearing about the incident, went

to the spot. All the accused saw, Ramkumar was coming, therefore, they fled away from there.

12. Statement of Surendra alias Golu recorded by Police is Ex.D-3. The said statement has been recorded by the Police on 25-4-2002 i.e. the date of incident. Surendra alias Golu, P.W.-10 has stated in his cross-examination that Police recorded his statement on the date when his uncle Ramkirtan died. Although Surendra alias Golu, P.W.-10 admits in his cross examination that again after 10-12 days later, his statement was taken by Police but on record no such statement is there. Lambodar Patel, P.W.-9 who is the Investigating Officer has stated in his statement that on 11-6-2002 additional statement of Golu alias Surendra has been recorded by him i.e. Ex.D-4. It appears that Ex.D-4 recorded by Police on 11-6-2004 is the statement referred by Surendra alias Golu, to be recorded again by the Police. Surendra alias Golu, P.W.-10 has stated in his cross examination that in his statement he had stated that all the accused persons were carrying knife. He further stated that he was not knowing the name of elder son of Khorbahra, therefore, he did not tell his name to the Police. He also stated that when they raised alarm, accused persons did not run away but after arrival of his grand father, uncle and father appellants ran away. Regarding timing also, the witness stated that they were in granary around 8.30. All these facts either by omission or contradiction has been brought to discredit his evidence.

13. *There are three categories of witnesses; first- wholly reliable, second- partly reliable and third- wholly unreliable. No parameter can be fixed to categorize the witness in these categories.*

From the facts and circumstances of the case, witnesses are to be categorized. A witness who is wholly reliable can be relied on for conviction or acquittal. A witness who is partly reliable and the part of his evidence which can be relied on, is required to be corroborated by other pieces of evidence and circumstances and such part, if relied on, can be utilised for recording conviction or acquittal. A witness who is unreliable, at the threshold, cannot be relied on for holding conviction or acquittal.

14. Here in the instant case, witness Surendra alias Golu has been produced by the prosecution as an eye-witness. Undoubtedly, he was present at the time of incident and witnessed the occurrence and had thereafter also narrated the story to his father. From the aforesaid discussion, it is evident that his evidence on some part is contradictory to his previous statement as also he has exaggerated his statement in Court. Therefore, taking into consideration these contradictions the evidence of Surendra alias Golu as a whole is not reliable and how much of his evidence can be relied on has to be determined by other corroborating piece of evidences and circumstances.

15. Ramkumar, P.W.-1 has deposed in his statement, he was doing some repair work over his house. At that time, his son Golu shouted that "कक्का को मार डाले हैं". Ramkirtan is uncle of Golu. Hearing that, he rushed towards the granary and saw all the appellants, who, after assaulting Ramkirtan, were fleeing away. They were carrying axe, club and knife. A number of injuries over his neck, cheek and hand were found from where blood was coming out. In cross-examination, he has admitted that, when he was

informed that Ramkirtan is lying dead on the spot then he went to the spot. He further says that Golu raised voice from the spot and hearing that voice he went to the spot. Further in his cross-examination he has admitted that when Golu cried out then he rushed to the spot and saw Ramkirtan lying dead there. From his admissions in cross examination, it is apparent that, he was not on the spot when the incident took place.

16. In cross examination, he stated that in his report and statement before Police he gave statement that all the accused persons were running carrying axe, club and knife with them. He also deposed that he has lodged report against all the accused and also named all the five accused persons. From his statement, it is manifest that after reaching on spot he outcried. Therefore, Ramcharan, Govind and son of Kotwar Gajendra came, thereafter he went to Police Station and lodged his report, Ex.P-1.

17. Report, Ex.P-1 has been written by Assistant Sub-Inspector M.R.Sinha, P.W.-8, who proved it. In the report, Ex.P-1, Ramkumar has made a statement that his son Golu came running from granary and told that Khorbahra has killed Ramkirtan by an axe, therefore, he got down from the roof and went to granary where he found dead body of his brother Ramkirtan and also saw injuries over his neck and head caused by an axe. He also reported that because of land dispute as a result of animosity Khorbahra had killed his brother Ramkirtan. From report Ex.P-1, it is apparent that he had not witnessed the incident but soon after the incident received information from his son Golu that Khorbahra has killed Ramkirtan, he went to spot and saw his brother dead. He went to

Kotwar, narrated the incident to Kotwar and other witnesses and thereafter lodged the report. From his report, Ex.P-1 and deposition, at the most his evidence can be relied only to support that at the time of incident he was over his roof, his son Golu was in granary along with Ramkirtan. Golu witnessed the incident, who came and informed Ramkumar that Khorbahra had killed Ramkirtan, therefore, he lodged the report. His evidence so far it relates to his being eye-witness or to witness the appellants running from spot carrying weapons cannot be accepted.

18. Bhuvan (P.W.-5), in his statement, deposed that, in early morning around 9 or 10, he was in his house. He heard the outcry of Ramkirtan sounding from Badi, he went towards Badi. He saw accused persons coming from there. Taneshwar and Daleshwar were carrying axe, Khorbahra was not having any arm. In Badi, he saw dead body of Ramkirtan having various cut injuries. In cross-examination, he further stated that Ramkirtan cried "बचावा ग". In his statement, recorded by Police, it has not been mentioned that Ramkirtan cried "बचावा ग", but this omission is not material, therefore, from his statement, this much can be believed that when hearing the outcry of Ramkirtan he went towards granary of Ramkirtan he saw Taneshwar, Daleshwar and Khorbahra coming from there.

19. Gajendra Kumar (P.W.-6), who accompanied Ramkumar to Police Station in his statement deposed that Ramkumar called and told that Khorbahra and others killed his brother, therefore, report is to be lodged. He saw the dead body of Ramkirtan. In cross examination, he admits that Ramkumar did not tell him that he was

on the spot. Therefore, his statement only supports the fact that Ramkumar informed him regarding killing of his brother by Khorbahra and others. This witness did not disclose the names of other persons. Therefore, so far as Khorbahra is concerned, upto that extent his statement is credible.

20. Ex.P-8 is memorandum statement of Khorbahra recorded by Lambodar Patel, Station House Officer, Kasdol. Khorbahra vide Ex.P-8 discovered the fact of recovery of an axe and Ex.P-9 is recovery of an axe from the house of Khorbahra at the instance of Khorbahra. Lambodar Patel (P.W.-9) in his evidence deposed that Khorbahra gave memorandum statement to the effect that he has concealed the axe which he will recover. The Statement, Ex.P-8 has been recorded by him. One axe was recovered from the house of Khorbahra which was kept in his Patav that has been seized vide Ex.P-9. Meghnath, P.W.-2 corroborated the fact of memorandum and recovery. From the evidence of both these witnesses, it is proved that on the memorandum of Khorbahra one axe has been recovered. Ex.P-4 is memorandum statement of appellant Taneshwar, who in his statement discovered the fact that he has kept an axe concealed in his Patav. Vide Ex.P-5 at the instance of Taneshwar, an axe has been seized. From the statement of Lambodar Patel (P.W.-9) and Meghnath (P.W.-2), memorandum statement Ex.P-4 so far it relates to discovery of fact regarding concealment of an axe and thereafter seizure Ex.P-5 vide which an axe has been seized at the instance of appellant Taneshwar has been proved.

21. Ex.P-6 is memorandum statement of Daleshwar. Daleshwar discovered the fact that he has kept the club concealed in his compound. The club has been seized at the instance of appellant Daleshwar vide Ex.P-7. Discovery and recovery both have been proved by the evidence of Lambodar Patel (P.W.-9) and Meghnath (P.W.-2).

22. Lambodar Patel, P.W.-9 in his statement has deposed that an axe seized from the possession of appellant Taneshwar and another axe seized from the possession of appellant Khorbahra were sent by him vide Ex.P-18 and Ex.P-19 to Medical Officer for examination. Dr. Y.K.Sharma, P.W.-11 in his statement deposed that two axes were brought on 18-5-2002 for examination. One Kulhadi has 2 inches sharp edge vide which injury No.4 caused to Ramkirtan could have been caused. Another axe has sharp edge 2.1 inches. Injuries No.1, 2, 3 and 5 found on the body of Ramkirtan could have been caused by the same axe. Evidence of both the witnesses is credible. Ex.P-26 is report of Assistant Chemical Examiner. Assistant Chemical Examiner after examining both the axes has reported the presence of blood stains over both the seized axes.

23. So far as involvement of appellant Khorbahra Verma in causing homicidal death of Ramkirtan is concerned, the evidence of eye witness Golu alias Surendra is available. Ex.P-1 is the F.I.R. which clearly proves that Golu after witnessing the incident rushed towards his house and told his father that Khorbahra has killed Ramkirtan with an axe. Ramkumar although is not an eye witness, but from his evidence it is clear that after receiving information from

Golu he came to spot, saw dead body of Ramkirtan and accompanied with Gajendra and others went to Police Station and lodged report Ex.P-1. Bhuvan, P.W.-5, who after hearing the outcry of Ramkirtan was going towards granary saw appellant Khorbahra coming from there. An axe has been seized at the instance of appellant Khorbahra which contained blood stains and from medical evidence it is clear that the axe seized from Khorbahra might have caused injuries No.1, 2, 3 and 5. Therefore, from all these evidence, the involvement of Khorbahra Verma in the offence has been proved.

24. So far appellant Taneshwar Verma is concerned, although Surendra alias Golu (P.W.-10) in his statement deposed that Khorbahra and all his sons killed Ramkirtan but the contradictions and omissions described earlier clearly show that he did not name the elder son of Khorbahra but in his Police Statement the name of Taneshwar Verma is there. So far Taneshwar Verma is concerned, it is material contradiction. Set apart soon after the incident, Golu gave information to his father Ramkumar. Ramkumar informed the fact to Gajendra and others and made report i.e. Ex.P-1. Gajendra, P.W.-6 did not say that Ramkumar informed him that Taneshwar Verma also killed his brother. In Ex.P-1, which is a report made by Ramkumar does not contain the name of Taneshwar Verma as assailant. Therefore, statement of Surendra alias Golu suffering infirmities and material contradiction and absence of name of this appellant in the F.I.R. as well cannot implicate this appellant in the involvement of causing homicidal death of Ramkirtan beyond reasonable doubt.

25. So far as appellant Daleshwar Verma is concerned, Surendra alias Golu deposed against him but taking into account his contradictory statement, absence of his name in the report Ex.P-1, which has been lodged soon after the incident by Ramkumar, P.W.-1 and absence of his name in the statement of witness Gajendra Kumar, P.W.-6 beyond reasonable doubt it cannot be held that Daleshwar Verma is also responsible for causing the death of Ramkirtan.

26. Ramkumar, P.W.-1 in his cross examination admitted the fact that a civil suit relating to land where incident took place was brought by them but they lost the suit and the Court held title and possession over the land in favour of the appellants. He further admits that his brother Ramkirtan had gone to fence the said land. He also admits that in that granary, his brother Ramkirtan carrying an axe and crowbar had gone. From the evidence of Surendra alias Golu (P.W.-10), it is clear that Ramkirtan was fencing the land and they were providing thorn bush to him. In these circumstances, certainly Khorbahra Verma had right to protect the property from being dispossessed but his right was subject to restrictions as envisaged in Chapter IV of the Indian Penal Code. The injuries caused by dangerous weapon like an axe on the vital part of Ramkirtan are in large numbers which clearly proves the intention of causing culpable homicide by the appellant. Although right of private defence of property was with appellant Khorbahra but he came armed with an axe in the field and intentionally inflicted various injuries by dangerous weapon axe and as a result of that Ramkirtan died stantaneously on the field. Taking into account the number of injuries, weapon used and the vital parts where injuries

were inflicted, it is established that appellant Khorbahra preplanned armed with an axe came and intentionally killed Ramkirtan, therefore, neither his act comes within the purview of right of private defence of property nor comes within the Exception No.2 of Section 300 of the I.P.C.

27. From the aforesaid discussion, we are of the opinion that, prosecution has utterly failed to establish charge under Section 302 read with Section 34 of the Indian Penal Code beyond reasonable doubt against appellant No.2, Taneshwar Verma and appellant No.3, Daleshwar Verma, but so far as appellant Khorbahra Verma is concerned, offence of murder punishable under Section 302 of the Indian Penal Code has been proved.

28. In the result, the conviction and sentence imposed upon the appellants Taneshwar Verma and Daleshwar Verma under Section 302 read with Section 34 of the Indian Penal Code are liable to be set aside and they are entitled to be acquitted of the charge under Section 302 read with Section 34 of the Indian Penal Code. So far appellant Khorbahra Verma is concerned, instead charge under Section 302 read with Section 34 of the Indian Penal Code he is guilty of committing murder punishable under Section 302 of the Indian Penal Code and liable to be sentenced.

29. In the result, the appeal partly succeeds. The conviction under Section 302 read with Section 34 of the Indian Penal Code against appellant Khorbahra Verma is converted to Section 302 of the Indian Penal Code and sentence imposed by the trial Court on appellant Khorbahra Verma is maintained. The

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conviction and sentence imposed upon the appellants Taneshwar Verma and Daleshwar Verma are set aside and they are acquitted of charge under Section 302 read with Section 34 of the Indian Penal Code. It is directed that, both of them be set at liberty forthwith, if not required in any other case.

Sd/-
L.C.BHADOO
Judge

Sd/-
V.K.Shrivastava
Judge

7-2-2006

G.Singh